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No. 81-2086

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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PHILIP DEL COSTELLO,
*Petitioner,*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 99 national and international unions with a total membership of 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

### INTEREST OF THE AMICUS CURIAE

The petition in this case, and the petition in *United Steelworkers of America v. Flowers*, No. 81-2408, proffer identical issues as to the time limits governing hybrid

breach of collective bargaining agreement/breach of duty of fair representation actions—issues that are important to all labor unions. The AFL-CIO's interest in the resolution of those issues is reflected by its participation in *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n. 2, and by its support of the petition in *Flowers*, see Petition in No. 81-2408 at pp. 1-2. The Federation files this brief *amicus curiae* to show that *Flowers* is a better vehicle than the instant case for addressing the issues presented.

## ARGUMENT

Two petitions for certiorari are pending before this Court that on their face present identical issues as to the time limits governing hybrid breach of collective bargaining agreement/breach of duty of fair representation actions: *United Steelworkers v. Flowers*, No. 81-2408, and the instant case. We believe that there can be no doubt, in light of the substantial circuit conflicts that have developed on both issues in the wake of *United Parcel Service v. Mitchell*, 451 U.S. 56, and the volume of cases pending in the federal courts whose outcomes depend upon the resolution of those conflicts, that this Court should address those issues this Term. But the choice as to *which* petition is granted could determine whether those issues are in fact resolved.

The two issues (described below) that have divided the lower courts in the wake of *Mitchell* both are squarely presented in *Flowers*. In contrast, there is substantial uncertainty whether one of these issues—indeed, the issue that logically should be addressed first—is squarely presented in the instant case. In consequence, a grant of certiorari in this case rather than in *Flowers* might disserve the interest in securing a definitive resolution of those issues this Term.

The issues proffered in both petitions are: (1) whether the six-month time limit of § 10(b) of the National Labor Relations Act, as amended, controls the timeliness of

hybrid breach of collective bargaining agreement/breach of duty of fair representation actions, and (2) if not, whether state arbitration time limits—which the *Mitchell* Court held applicable to such actions against *employers*, at least where § 10(b) is not invoked by the defendants—also applies to such actions against *unions*. Logically, the § 10(b) issue should be addressed first, for if, as we believe to be true, federal law provides a uniform applicable time limit for all cases brought by employees against unions and employers challenging the resolution of a grievance in the contractual grievance-arbitration system, then there is no occasion to look to state law at all.[1]

There is a substantial question, however, whether § 10(b) issue is adequately raised in the instant case. The petitioner in the instant case—the party asserting the applicability of § 10(b)—is the plaintiff. But this suit was filed more than six months after the final disposition of petitioner's grievance, and it is not self-evident, therefore, that a holding that § 10(b) is applicable (the holding petitioner seeks) would warrant a reversal of the decisions below dismissing petitioner's complaint as untimely.

Petitioner does contend that he is entitled to tolling for a portion of the period between the grievance disposition and the filing of suit, and that such tolling would render his complaint timely under § 10(b). But the district court did not decide the tolling question, believing that tolling could not affect the timeliness of this suit (*Del Costello* Pet. App. at B-18-19). The district court so be-

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[1] In *Mitchell*, this Court recognized the possibility that § 10(b) might be applicable to such actions, but declined to resolve the question because the parties had not raised § 10(b) either in the lower courts or in their briefs to this Court. See 451 U.S. at 60, n. 2. Instead, the Court resolved only the question posed by the parties: on the assumption that the applicable time limit was to be borrowed from state law, *which* state time limit should be borrowed?

lieved because nobody was championing § 10(b)'s applicability in the district court, and that court thus understood the choice to be between two state time limits: one of 30 days, and the other of three years (*id.* at B-17). On that understanding, tolling was irrelevant, for petitioner's action was filed less than three years after the grievance disposition and "[e]ven assuming that limitations did not begin to run" for the period of tolling claimed by petitioner "this action was filed more than 30 days after that time" (*id.* at B-19).[2] The district court found the 30-day time limit applicable, and dismissed petitioner's suit. On appeal, petitioner *did* champion applicability of § 10(b), but the court of appeals affirmed "on the basis of [the district court's] memorandum and order" (*id.* at B-2), without alluding either to § 10(b) or to the unresolved tolling question. In these circumstances, it is far from clear that the § 10(b) issue is appropriately presented in this case.

In contrast, that issue is squarely presented in *Flowers*. There, suit was filed eleven months after the arbitration decision, and there is no tolling claim. It is the defendant union that invokes § 10(b), contending that that is the controlling time limit and that the complaint accordingly was untimely. The Court of Appeals squarely ruled on that issue, rejecting the applicability of § 10(b) and rejecting as well the applicability of the 90-day state arbitration statute which the union asserted as the alternative basis for dismissal. That court held that a three-year state statute governing non-medical malpractice actions applied and accordingly that the complaint was timely filed.

In sum, a grant of certiorari in *Flowers* would assure the orderly disposition, in their proper order, of the time

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[2] The petition herein at pp. 7, 8-9, states that the district court resolved the tolling issue in petitioner's favor. Reference to this district court's opinion, however, establishes that the court did *not* resolve that issue (*Del Costello* Pet. App. at B-19, B-27).

limits questions presented in this case and in *Flowers*. This Court would be able to address first the question whether § 10(b) applies, and, if that section does not apply, to then address the question whether the union is entitled to the benefit of the state arbitration time limit. A grant of certiorari in the instant case instead would provide substantially less assurance that the § 10(b) question would be resolved, and could lead to another situation, as in *Mitchell*, wherein this Court winds up addressing only the logically subordinate question of which state statute is to be borrowed in those situations where the § 10(b) issue is not squarely presented.

## CONCLUSION

For the reasons set forth above, this Court should grant the petition in *United Steelworkers of America v. Flowers*, No. 81-2408, and hold the petition in the instant case pending disposition of *Flowers*.

Respectfully submitted,

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